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SUPREME COURT U

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 18.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
Attorneys for Petitioner.

THE SMITH-BROOKS PTG. CO., DENVER.

n the Supreme Court of the United States.

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PETITION FOR REHEARING.

Comes now the petitioner above named and respectfully presents its petition for a rehearing in the above entitled cause, and by which the petitioner prays that the judgment of this Honorable Court, rendered on the 30th day of January, A. D. 1905, may be wholly set aside, and a new and different judgment entered therein in favor of said petitioner, and your petitioner respectfully shows that the opinion and judgment of said court was erroneous in the following particulars, to wit:

1. The said court erred in that part of its opinion where it stated the law in regard to mines and mining claims to be as follows:

"Was there error in striking out these defenses? By section 2319, R. S., 'all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase.' Until, therefore, the title to the land passes from the government the minerals therein are 'free and open to exploration and purchase.' A lode locator acquires a vested property right by virtue of his location (Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 220), but what is the extent of that property right? Section 2322 defines it as follows: 'The locators * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' The express grant made to the locator by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the government the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the government."

2. The court erred in its opinion in said cause in holding that a patent did not relate back to the filing of the location certificate in the office of the county clerk and recorder as required by the federal and state laws, it being shown by the record in this cause and by the pleadings, so far as the relative priority of the tunnel and lode claims are concerned, that the lode claims were prior in point of time to the tunnel claim.

3. The court erred in declaring the law to be that the tunnel claimant need not adverse a lode claim where there was an actual conflict between the lode claim and the tunnel claim.

4. The court erred in failing to take notice of the fact that in the record in said cause it appears that the tunnel claim is void for the reason that it never complied with the law.

For these reasons this petitioner respectfully prays that this court will set aside the opinion which it has already filed in said cause, and grant to this petitioner a rehearing, and we submit herewith a brief setting forth the reasons and authorities why this petition should be granted.

Respectfully submitted,

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
Attorneys for Petitioner.

We hereby certify that the foregoing petition is in our opinion well founded, and is not made for the purpose of delay.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT.

The following mining companies and mine owners join the petitioner in a request for the rehearing, because of the obvious and serious menace of the opinion to the mining industry of the United States:

Butte, Montana—

Anaconda Copper Mining Company,
By John Gillie, Gen'l Supt. of Mines.

Butte & Boston Consolidated M'g Co.,
By John Gillie, Supt.

Parrot Silver & Copper Co.,
By N. A. Gallwer, Gen'l Mgr.

Boston & Montana C. C. & S. M. Co.,
C. M. Goodale, Manager.

The Colorado S. & Mg. Co.,
By Jas. B. Gallaher, Mgr.

Washoe Copper Co.,
By John Gillie, Gen'l Supt. of Mines.

Bull Frog, Nevada—

A. G. Cushman,
Prest. Montana Bull Frog Mng. Co.
Prest. Amethyst Bull Frog Mng. Co.
Prest. Paymaster Mining Co.

Bull Frog Annex Mining Co.,
By A. K. Wheeler, Sec'y.

Bull Frog Consolidated Mines Co.,
By A. K. Wheeler, Sec'y.

Cripple Creek, Colorado—

The Portland Gold Mining Co.,
By Irving Howbert, Prest.

The Anchoria Leland M. & M. Co.,
By C. W. Howbert, Vice-President.

The El Paso Consolidated Gold Mining Company,
By S. S. Bernard, President; J. M. Jordan, Secretary.

The Cripple Creek Consolidated Mining Co.,
By J. F. Humphrey, President.

The Agnes Gold Mining Company,
By F. H. Dunnington, Sec'y.

The Golden Eagle Mines,
By F. H. Dunnington, Sec'y.

The Maria A. Gold Mining Company,
By F. H. Dunnington.

The Acacia Gold Mining Co.,
By K. McKenzie, Vice-President.

The Midget Gold Mining Company,
By Frank G. Peck, Vice-President.

The Montreal Gold M. & M. Co.,
By Frank G. Peck, Secretary.

The Gold Hill Bonanza M. Co.,
By Irving Howbert, Prest.

Chas. S. Keafer.

James J. Cone.

The Strong Gold Mining Co.,
By Wm. Lennox, President.

The Katinka Gold Mining Co.,
By Wm. Lennox, President.

The Gold King Mining Co.,
By E. A. Colburn, President.

The Ajax Gold Mining Co.,
By E. A. Colburn, President.

Ouray, Colorado—

Camp Bird, Limited,
By W. J. Cox, Gen. Mgr.

Creede, Colorado—

Jesse H. Lewis.

A. M. Collins.

Silas Frank.

A. D. Parsons.

E. Stone.

G. A. Pettitt.

A. W. Derrick.

H. C. L. Bower.

W. C. Sloan.

Wm. Stone.

J. F. Biles.

N. H. Slaght.

C. W. Stump.

Theo. A. Wheeler.

M. J. Moses.

The Creede United Mines Company,
By Wm. P. Malburn, Sec'y.

The Humphreys Tunnel & Mining Company,
By Geo. Davis, President.

The Big Kanawha Leasing Co.,
By Geo. Davis, President.

The Florodora Mining Company,
By Geo. Davis, Treas.

The Del Monte Leasing Co.,
By A. E. Humphreys, President.

Leadville, Colorado—

Jas. A. Shinn.

The Evalyn Mining & Leasing Co.,
By Wm. P. Malburn, Sec'y.

Joseph Golob.

Central City, Colorado—

Lyne S. Newell, Jr.

Pleasant Valley Mining & Milling Co.,
By R. W. Cokell, Sec'y.

Bi-Metallic M. & M. Co.,
By R. L. Martin, President.

The King Bee G. M. Co.,
By R. W. Cokell, Sec'y.

Samuel A. Rank.

Gregory-Buell Cons. G. M. & M. Co.,
By R. L. Martin, Manager.

Idaho Springs, Colorado—

E. D. Quigley.

The Stanley Mines Co.,
By A. G. Brownlee, Prest.

Garfield, Colorado—

Joseph G. Marriott.

Silverton, Colorado—

The Quartz M. & M. Co.,
By M. B. Holt, Prest.

Cupurite, Nevada—

John T. Murphy,
Owner in The Jasper Claim.

J. H. Platner.

Diamondfield, Nevada—

Charles A. O'Connell,
Manager New York Group.

Goldfield, Nevada—

James F. O'Brien,
Pres. Cache Gold M. Co.
Vice-President Empire Mng. Co.

A. J. McDarmel.

Hanley T. Allyn.

L. De Sallier.

Pullen & Beardsley.

W. T. Liggett,
Pres. Goldfield Combination M. Co.

G. W. Thatcher.

Scott E. Jameson,
Director Goldfield Apex Co.
Sec'y Goldfield Bull Frog Dev'l. Co.

R. C. Kanters,
Supt. and Director Copperfield Mines Co.

J. B. Harris,
Of Copper King Mines.

B. J. Reilly,
President of Hibernia Goldfield Mng. Co.

M. H. Jones.

Associated Mining & Development Co.,
By H. R. Bacon, Consulting Engineer.

P. H. McLaughlin,
Prest. Goldfield Lucky Strike Mng. Co.

F. A. Butler, Jr.,
Owner of the Hungry and Rainy Day Claims.

W. S. Williams,
Wonder Goldfield Mng. Co.
Sec'y Goldfield Bull Frog Mng. Co.

Thos. Ramsey,
Sec'y Berkeley Goldfield Mng. Co.

Tonopah, Nevada—

The Tonopah Mg. Co. of Nevada,
By F. A. Keith, Gen. Mgr.

Malcolm L. MacDonald, General Manager.

Southwestern Nevada Mines Co.

Goldfield Simmerone Mg. Co., Goldfield, Nev.

Goldred Mines Co., Goldfield, Nev.

Montana Tonopah Mg. Co.,
By D. B. Gillies, Mgr.

North Star Tunnel & Mg. Co.,
Frank Golden, Prest.

J. P. Brissell, Secretary of Ray Consolidated M. Co., Columbia Mountain M. Co., North Tonopah M. Co.

Tonopah Extension M. Co.

Golden Anchor Mining Co.

Red Rock Cons. M. Co.

Pittsburg-Tonopah M. Co.

Has Brouck M. Co.

Goldfield-Highland M. Co.,
By John McKane, Gen'l Mgr.

W. H. O'Neil.

Jas. G. Ford.

Jno. T. Wheeler.

E. R. Shields.

Elton Davis, D. D. S.

Star & Dulfer, by F. W. Dulfer.

L. H. Conley & Co.

H. Fletcher.

J. K. Chambers.

Jas. H. Atkin.

T. B. Weir.

F. Taylor.

H. W. Schell.

Bullfrog M. Co.,
By H. H. Clark, Mgr.

Kenneth M. Jackson.

Midway Mining Company,
By H. C. Brougher, Prest.

W. J. Douglas.

M. S. Bonnifield, ex-Justice Supreme Court, Nevada.

Goldfield, Nevada—

Alden H. Burns.

D. F. Sullivan.

Tonopah-Goldfield Trust Co.,
By W. D. Lawton, Prest.

Nevada Exp. Co.,
By W. O. Thompson, Vice-Prest.

J. W. Palmer & Co.

Goldfield Cons. M. Co.,
By Alfred G. Winter, Prest.

J. C. Denton.

John Beckmans.

Thos C. Dobbins.

G. A. Griffin.

L. E. Wilson.

G. M. Smith.

C. A. Richards.

Wm. Maxwell.

H. T. Bragdon.

P. M. Bowles, Jr.

D. H. Kehoe.

Patlach M. & M. Co.,
By Marshall Bond, Prest.

Goldfield Consolidated M. Co.,
By Jas. R. Boal, Treas.

Gold Hill Mining Co.,
By H. W. Knickerbocker, Prest.

J. & R. Ridge.

Nevada Mining & Exp. Co.

Black Butte Goldfield M. Co.

Bullfrog Nat'l Bank M. Co.

Bullfrog Crown Point M. Co.

Elkhorn Gold M. Co.

Goldfield Mascot M. Co.

Forward Mining & Dev. Co.

Yankee Girl G. M. Co. of Bullfrog,
By L. L. Patrick, Prest.

The Golden Sun M. & M. Co.,
By Edgar T. Butler, Prest.
Gold Horn M. Co.
Tonopah Belcher M. Co.
Goldfield Columbia M. Co.
Esmeralda Placer Co.,
By F. M. Lathrop, Prest.

Bullfrog, Nevada—
G. G. Davis.
Wm. Ladlee.
D. P. Beebe.
Frederick Wiggins.

Tule Canon, Nevada—
G. G. Rice.

Desert District, Nevada—
Nevada Southern S. G. & S. M. Co.,
By Frank P. Davis.

Sodaville, Nevada—
A. I. D'Arcy.

Ray, Nevada—
Arthur Kunze.
I. W. Skelton.

Beatty Mining District, Nevada—
Nevada Bullfrog Mines Co.,
By C. S. Wilson, Sec'y and Att'y.
C. O. Neckes.

Casa Grande, Arizona Territory—
C. M. D'Arcy.

Park City, Utah, and Lead, South Dakota—
Samuel McLachen.

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Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF ON APPLICATION FOR REHEARING.

A. T. GUNNELL,
C. S. THOMAS,
W. H. BRYANT,
Attorneys for Petitioner.

THE SMITH-BROOKS PRESS, DENVER

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Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF ON APPLICATION FOR REHEARING.

The petitioner has filed in this case an application for a rehearing. We confess that were it not for the fact that the issues involved are momentous to the mining industry in general, we would not presume to trouble this court any further with this controversy. It has been argued orally twice, the court

has had the benefit of elaborate printed briefs and know that all the justices have given to every phase of the case patient and careful consideration. We know that the opinion already rendered was arrived at as the result of extensive and painstaking investigation on the part of the members of the court, and recognizing that the time of this tribunal ought not to be taken up with petitions that only endeavor to reopen some old phase of the same argument, we have abstained until this time from filing and pressing this petition. But the more the decision of the court has come to be understood by the mining community in general, the more far reaching it has been found to be, and the more convinced are we that it has overthrown so many settled principles of mining law, has thrown such doubt on the sanctity of mining patents as to render insecure thousands of mining titles and threatens in many aspects the very existence of mining itself in many localities. So tremendous, indeed, seems to be the effect of the decision that we believe this court will once more consider the questions involved, and we are satisfied that if it will but do so, it will frankly acknowledge any mistakes made in the decision and withdraw the same. It is in this belief and for these reasons that we have filed and now propose to urge our petition for a rehearing.

Since the inception of mining in the Western states and territories, every officer of the land department, who has had anything to do with the administration of the land laws, has come to regard the tunnel section with suspicion as carrying within it principles which might some day be invoked to the great detriment of mining. Every text writer who has written upon the subject has reached this same conclusion.

The courts of the mining states early settled into this belief, but in construing the law they have announced rules which have prevented tunnels so far from becoming an active menace to the mining industry. It has remained for this court in this case to announce principles which have removed all barriers heretofore erected, and gives the statute a construction that will enable all the fears of the land department, the courts of the mining states and the text writers to be realized. In the opinion promulgated in this case, the court has held: (1) That a valid location, before the owner applies for patent only gives the locator title to the surface, and leaves the ground underneath the surface open for exploration and discovery; (2) that when a patent has been obtained it does not relate back to the inception of the record title of the locator, but only to his application for patent; and (3) that the owners of a tunnel running through a lode claim do not have to adverse the application for patent made by the lode claimant. These three propositions are so fundamentally opposed not only to the previous decisions of this court, but to the well recognized understanding of the mining statutes by the mining states in general that they seem revolutionary and if persisted in mean such an unsettling of mining titles as will result in the withdrawal of capital from that business and in the crippling of the industry to an extent that can not be calculated.

To show the court the general position which the officials of the land department and the text writers have taken in regard to tunnel claims, we call attention to the following citations; Mr. Rossiter W. Raymond served for several years as special commissioner for the treasury department in investigating

conditions of the mining industry in the Western states, and made several reports concerning the same. In a report made to the secretary of the treasury, which was submitted to Congress on the 16th day of March, 1871, Mr. Raymond referred to tunnels generally. This report was printed under the head of "Mineral Resources West of the Rocky Mountains, 1871." On page 323 we find the following language:

> "The sale of 'tunnel claims' at exhorbitant prices, as if they were in themselves valuable property, is reprehensible. A tunnel claim may be a valuable auxiliary to the owners of the veins which can be drained by it. In and of itself it is the privilege of spending money to cut veins which may belong to other people. As far as blind lodes are concerned, the tunnel claim does, indeed, give so many feet upon each vein discovered by the tunnel; but surface explorations would discover many more veins at the same cost than a tunnel will cut; because the surface prospector can go where he likes to look for outcrops, while the tunnel must hold a single course. It is almost as absurd to run a cross-tunnel after blind lodes as it would be to sink a shaft at haphazard in dead rock. The rights attached to a tunnel claim unaccompanied by surface ownership of known lodes to be pierced, are extremely visionary. The only tunnel right which would be really valuable our laws do not give. I mean the right to exact royalty from mines benefited by the tunnel. This has been granted by

contracts and confirmed by legislation in the case of the Sutro Tunnel in Nevada, an enterprise which, I need hardly say, as it is connected with the largest, deepest and most productive mines in the country, does not belong in the category I am now discussing. The tunnel royalty was, in Europe, for centuries the privilege of every one who should drive a tunnel not less than thirty feet deeper than any preceding one, so as to benefit an overlying mine. I do not say it would be wise to make this provision generally applicable to our mines; but this I do say, that in the absence of some tangible source of revenue, deep cross-cut tunnels, under-running only undeveloped or unknown lodes, or lodes belonging to other owners, are gratuitous folly."

The same distinguished authority a few years later wrote an article construing Section 2323 of the revised statutes, in which, after quoting the section, he says:

"This is the only provision in the revised statutes concerning tunnel rights. Perhaps it is fortunate that there are no more. Certainly this one is ambiguous and perplexing enough, and additional ones of the same character would have made confusion worse confounded.

"In attempting to discuss this provision and to set forth its interpretation by the courts, I am led at the outset to point out

the historic cause of its fundamental defect —a cause which underlies also many other defects of the act of 1872.

"The customs of miners and the act of 1866 recognized, as the foundation of mining title, the priority of discovery. The act of 1872, intended to remedy certain evils developed in the administration of the act of 1866, comprised various provisions for that purpose (provisions, that is to say, which assumed the principle of the former act, and only modified its application) and also provisions of a totally different character, creating the new principle of apex-rights, and thereby nullifying the customary rights attached to discovery pure and simple. The act containing this revolutionary innovation was never carefully harmonized throughout, in accordance with the new principle thus established, and presents many features really intended to be parts of the old discovery-law (so to speak) and not framed to be parts of the new apex-law. This tunnel section is one of these anachronisms. As an amendment to the act of 1866, it is, taken by itself, simple and clear enough, though perhaps not wise. As a part of the act of 1872, it is inconsistent, incomplete and mischievous."

6 Mineral Industry, 681.

We trust the court will read this entire article, and for the purpose of getting it to do so, we print it as an appendix to this brief.

This later article of Mr. Raymond's was written in 1897. The land office early discovered the tendency of section 2323 as shown in the rules and regulations adopted relating to mineral lands. Rule 26 reads as follows:

> "26. Tunnel not Worked. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purpose named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels to the detriment of the mining interests and to the exclusion of bona fide prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a reasonable diligence on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all discovered veins on the line of such tunnel."
>
> Morrison's Mining Rights, page 310, 9th Ed.

We copy this rule from the rules issued December 1, 1891, and which were in force at the time the rights in controversy in this action were acquired.

The position of text writers upon the subject may be gathered from Mr. Lindley's work on Mines, section 467. Mr. Lindley endorses all that Mr. Raymond

says, and adds some views of his own along the same lines.

Mr. Morrison reaches practically the same conclusion in his book of Mining Rights. We quote from page 230 of the 11th edition of his work:

> "The right to tunnel has been exercised since lode mining began on the Pacific coast. Such claims are frequently mentioned in the district rules and were recognized by Colorado statute as early as 1861.
>
> "The trespass of a tunnel cutting through country rock across a claim at great depth is not of that class denominated as destructive or irreparable, but it opens a private back door to the miner's underground wealth.
>
> "And applying the theory that every surface claimant owns to the center of the earth, no man has a right to drive a tunnel underneath the property of another without his license or consent.
>
> "Such right was constantly exercised without much question and it had been expressly held that it might be asserted under district rules. Bliss vs. Kingdom, 15 M. R., 239.
>
> "But especially since the sweeping demands of tunnel sites after the Rico-Aspen decision, compelled miners in self-protection to check their encroachments, any implied license to penetrate under previous locations or patents without grant or permit has been

> expressly denied. The decisions to this effect have been uniform, and they have been followed by the National Supreme Court. Richards vs. Dower, 64 Cal., 62; 73 Cal., 477; Amador Co. vs. Dewitt, 73 Cal., 482; Calhoun Co. vs. Ajax Co., 182 U. S., 499."

It is needless to say that Mr. Morrison's conclusions as to the effect of the decisions of this court are erroneous if the opinion in this case is to prevail.

The distinguished jurist who wrote the opinion in the case at bar uses the following language in a cause decided at the last term of this court:

> "Many regulations of the land department and decisions of courts found their warrants in an effort to so adjust various statutory provisions as to carry out what was believed to be the intent of congress, and at the same time secure justice to miners and those engaged in exploring for mines."
>
> Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 220.

We may safely say that all of the decisions of this tribunal down to the present time have endeavored to carry out this idea of Mr. Justice Brewer, and if some of the cases have resulted in hampering in any way the mining industry it is because such decisions were made necessary by the letter of the law. But the case at bar is one that will result in injustice to miners and those engaged in exploring for mines; will retard the development of the mineral domain and frighten all capital invested in the mining industry, and yet

it is one that is not called for by the letter of the law, and is opposed to the entire current of the previous decisions of this court. Instead of carrying out the settled policy of the government to restrict tunnel claimants to the letter of the law, it reverses this entire policy, and gives the tunnel claimant rights never contemplated by congress and affords him undue and unfair advantage upon the mineral domain of the United States.

Bearing in mind these views in general relating to tunnels, we will take up the points which we desire to present on this petition for a rehearing.

I.

We believe the court erred in the following portion of its decision:

> "Was there error in striking out these defenses? By section 2319, R. S., 'all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase.' Until, therefore, the title to the land passes from the government the minerals therein are 'free and open to exploration and purchase.' A lode locator acquires a vested property right by virtue of his location (Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 220), but what is the extent of that property right? Section 2322 defines is as follows: 'The locators * * * shall have the exclusive right of possession and enjoyment of all the sur-

face included within the lines of their locations, and all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' *So that the vested property right of the locator is limited to the surface and the veins apexing within its boundaries. Undoubtedly, therefore, until the entry of the plaintiff's lode claims, and possibly until the issue of the patent, the defendant had the right to drive its tunnel through the subsurface of the plaintiff's lode claims. That ground still remained the property of the government and was 'free and open to exploration.'*"

The lines in italics have since been modified by the court to read as follows:

"The express grant to the locator made by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the government the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the government."

But the legal effort of the entire passage we think remains the same as though the language first used had stood as the opinion of the court. A distinction is attempted to be drawn between the right of a perfect location before and after patent. Is there the slightest warrant for such a distinction in the statute or in any previous decision of this court? Does not a perfect location give to the owner the same title that a patent confers so far as possessory rights are concerned? This court has always said so down to the time it used the above language.

The court in the above quotation sites the case of Clipper M. Co. vs. Eli M. & L. Co., supra. We were counsel for the plaintiff in error in that case. We argued in our printed briefs and orally before the court that the title to an unpatented placer claim was in the government of the United States, and was free and open to exploration by persons claiming under a higher title; that is to say all persons looking for lode claims. It was acknowledged by both parties to that litigation that a perfect lode location gave to the locator the absolute right to the possession not only of the surface, but of all portions of the claim included within the lines thereof to the center of the earth. The distinction sought to be made was that a placer claimant did not have such rights, we insisting that so long as the placer claim was not patented a prospector had the right to go within its limits, discover and locate a lode if any should be found therein. But the court refused to take our view of the law, and held that an unpatented placer was of the same dignity as an unpatented lode claim, and stated in express terms that an unpatented lode claim gave to the lo-

cator the exclusive right to all of the ground included within the lines of his location, not only the surface, but everything beneath the surface. We quote the following from the language of Mr. Justice Brewer in that case:

> "Nor is this 'exclusive right of enjoyment and possession' limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' *In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground becomes subject to an exclusive right of possession and enjoyment by the locator.* And this exclusive right of possession and enjoyment continues during the entire life of the location, or in the words of Chief Justice Waite, just quoted, while there is a 'valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States.' There is no provision for, no suggestion of a prior termination thereof."
>
> Clipper Mining Co. vs. Eli Mining & Land Co., 194 U. S., 227.

But we now find the court, in the case at bar, not only adopting but extending the rule which we contended for in that case so as to hold that even

a lode claimant who has not secured a patent has only a right to the surface and the veins beneath the surface apexing within the limits of the claim, and all the balance of his ground is "free and open to exploration." Any one can go beneath the surface of the claim and explore it to the same extent as though the location had never been made. This is a novel doctrine to the mining world. It was unnecessary to a decision of the case, and is neither warranted by the statute nor by any previous decision of this court. The language of the statute is:

> "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines of such surface locations."

The court construes the last part of the quoted language as a limitation upon the first. In other words, it limits the exclusive possession given to the locator beneath the surface only to veins which have their top within the surface lines. We respectfully submit that this is not the intention of the statute, and has never been held to be so. *The intent of the statute by the use of this language was only to define extralateral rights to veins.* In other words, it was to extend the exclusive possession not only to the claim actually located, but to all veins wherever they dipped outside of the claim proper, provided they had an apex within the claim. Instead of being words of limitation, they are words of expansion.

We would respectfully ask why a distinction is made between patented and unpatented claims. We are told that the ground beneath a valid lode claim, except the veins contained therein, is "free and open to exploration," before patent. We would ask why is it not equally "free and open to exploration" after patent?

Sec. 2325 of the Revised Statutes, which makes provision for securing a patent, simply says that *a patent for any lode claim located for valuable deposits* may be obtained by following out the provisions of that section. That is, a patent only covers what is included within the location. If the land beneath the surface except that very small part of it which contains the lode is the property of the government and does not belong to the locator by virtue of his location, it must remain the property of the government, and never pass to the locator by virtue of any patent proceedings. In other words, if the court is correct, we can not conceive why there should be any

difference after patent. This court, in the case of Chambers vs. Harrington, 111 U. S., 350, uses this language:

> "But in all this legislation to the present time, though by appropriate proceedings and the payment of a very small sum, a legal title in the form of a patent may be obtained for such mines, the possession under a claim established according to law is fully recognized by the acts of Congress, and the patent adds little to the security of the party in continuous possession of a mine he has discovered or bought."

But if the rule stated in the case at bar is to prevail, a patent does add much to the security of the party in continuous possession of the claim. It gives him a tract of ground that he never before possessed. This case of Chambers vs. Harrington is but one of many in which this court has heretofore held that a valid location was just as valuable and conferred exactly the same rights upon the locator that a patented location conferred. In other words, as said by Mr. Justice Miller in that case, the patent added but little to the rights previously existing. We would cite the following authorities in regard to that:

Forbes vs. Gracey, 94 U. S., 762.
Belk vs. Meagher, 104 U. S., 279.
Gwillam vs. Donnellan, 115 U. S., 45.
St. Louis Co. vs. Mont. Co., 171 U. S., 650.

In these and many other cases this court has announced the rule which it announces in the Clipper

case, that the entire body of ground went to the locator of a valid location. Numberless cases have been decided in the state courts reaching the same conclusion. The rule as it has been understood in Colorado is well stated in the following language of the Supreme Court of that state:

> "Thus it appears that a mining claim on the public domain is real property and the subject of complete ownership as a claim, and that the locator thereof, or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the government patent, and is entitled to the exclusive possession and enjoyment against every one, including the United States itself."
>
> McFeters vs. Pierson, 15 Colo., 201.

The Supreme Court of Montana and the Circuit Court of Appeals for the Ninth Circuit have construed the language of the statute in a case where the distinction made in the case at bar was urged, and both reached the conclusion for which we contend. We quote from the Circuit Court of Appeals the following:

> "The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives

the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws, as we construe them, grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute (section 2319) declares 'the lands' in which valuable mineral deposits are found to be open to occupation and purchase; and section 2325 provides that 'a patent for any land claimed or located for valuable deposits may be obtained in the following manner.' These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the 'veins, lodes and ledges' is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In Copper Co. vs. Heinze, 64 Pac., 326; 53 L. R. A., 491, the Supreme Court of Montana held that the owner of a mining claim is prima facie the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the

lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said:

" 'Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines is an expansion of the rights which would be conferred by a common-law grant.'

"Of similar import is State vs. District Court of 2d Jud. Dist. of Silver Bow County (Mont.), 65 Pac., 1020.

"In Doe vs. Waterloo Min. Co. (C. C.), 54 Fed., 935, Judge Ross said:

" 'Except as modified by the statute, no reason is perceived why one who acquires the ownership of possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law.'

"In Consolidated Wyoming Gold Min. Co. vs. Champion Min. Co. (C. C.), 63 Fed., 540, Judge Hawley said:

"'Hands off of any and everything within my surface lines, extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim.'"

St. Louis M. & M. Co. vs. Mont. Min. Co., 113 Fed., 902.

The text writers have all reached the same conclusion. Mr. Lindley says:

"Whatever may be reserved out of the grant created by the perfection of a valid lode location, one thing is quite manifest. The right of a senior locator to the exclusive possession of the surface can not be invaded, assuming, of course, that at the time to which the location relates no rights of way or servitudes were imposed upon the land. While, as we shall hereafter see, outside apex proprietors may penetrate underneath the surface in the lawful pursuit of their veins, the law expressly preserves the surface from invasion.

"The only qualification to this rule is the privilege accorded under certain circumstances to junior locators to place the lines of their locations upon or across the senior claim, discussed in previous sections. The use of such privilege is not to be considered an invasion, as no rights can be asserted thereby in hostility to the senior title.

"What are the presumptions, if any, flowing from the ownership of the surface?

"Prima facie, everything within the vertical bounding planes belongs to the locator.

"In the language of Judge Hallett: 'We may say, that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own boundaries he is regarded as the owner of all valuable deposits until some one shall show a higher right.'

"While the courts do not altogether agree as to the weight of testimony necessary to overthrow this presumption, there is an undoubted consensus of opinion in support of the above rule.

"We may safely base our discussion of the more important elements of the law applicable to lode locations upon this presumption, and, as we progress, endeavor to show the circumstances under which, and extent to which, reaching ultimate conclusions by such gradations as the nature of the subject will permit."

1 Lindley on Mines, section 551.

Mr. Morrison, Mr. Snyder and Barringer & Adams are all to the same effect.

Morrison Mining Rights, 10.

Snyder on Mines, 420.

Barrington & Adams, 317.

Any other conclusion than these quoted can not be gathered from the statute. In reason this must have been the intent of congress beyond peradventure.

It would be a strange mockery to grant a miner the surface and withhold the subsurface. We could understand the rule should the court hold that in agricultural grants or townsite or similar entries only the surface passed and that it was the settled policy of the government to hold all mineral beneath the surface for exploration and purchase by those who should first discover them. Both reason and precedent might sanction a ruling of this kind. At common law gold and silver were royal metals and were the property of the crown even when found beneath the surface of a subject. But a ruling to the effect that the locator of a mine only gets the surface and the actual veins in his ground, and that the balance of the subsurface does not pass, is incomprehensible. The business of a miner carries him beneath the surface. To him the surface is only an incident, merely a part of the working by which he passes underground to engage in his real work. The shafts, tunnals, winzes and workings by which ore is found and brought to the surface are nearly all made in the country rock and not in the veins themselves. Very few veins are large enough to contain all these workings between their walls. And yet we are now told that the ground in which these workings are made does not belong to the locator, but is the property of the government and may be entered by the first comer to explore for other veins. The newcomer, too, is at the mercy of the next man, because no possessory title can be acquired to anything beneath the surface except lodes themselves.

We do not believe the court ever intended to announce this doctrine, and we are satisfied that it will grant our application for a rehearing, and that upon

more serious reflection it will withdraw this entire proposition. This means, of course, a rehearing of the entire case, and, as subsequent conclusions are based on this premise, a reversal of the entire position of the court.

II.

THE DOCTRINE OF RELATION.

The second proposition announced by the court which we believe to be radically wrong, is that of relation. The court here reverses the old doctrine that a patent relates back to the date of the location of the claim and announces substantially that it only goes back to the date of entry. It makes the date of location rest in parol and not upon the record title in the public offices provided by the federal and state law. Heretofore parties have rested secure upon the record required to be kept; now they must, even after patent, be prepared to meet attacks upon their title that no prudence can provide against and frequently no wisdom can prevent from being successful.

The reasons given by the court for its conclusion are chiefly two: (1) the origin of the locator's title is an unverified location certificate placed upon land records and not filed with any land officer, and (2) the order of time in which the various acts of location are performed is immaterial and the location certificate is no evidence thereof, and neither is the

patent. We confess that neither of these appeal to our reason, and neither is sustained by the statutes or the decisions.

The location certificate is expressly provided for by the federal statute; it must state the date of location, and the application for a patent must contain sworn statements of the same facts. We quote the following from section 2324 of the Revised Statutes:

> "The miners of each mining section may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

Pursuant to the authority of this statute the legislature of Colorado has passed an act regulating the location of mining claims. We quote the following sections:

> "3150. The discoverer of a lode shall, within three months from the date of discov-

ery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

"First—The name of the lode.

"Second—The name of the locator.

"Third—The date of location.

"Fourth—The number of feet in length claimed on each side of the center of the discovery shaft.

"Fifth—The general course of the lode as near as may be.

"3152. Before filing such location certificate the discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.

"Second. By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

"Third. By marking the surface boundaries of the claim."

The state statute is as binding a regulation as the federal statute. *But both expressly provide that a lode must be discovered before a location can be made or a location certificate filed.* Is not the certificate therefore a federal record just as much as though it were filed in the land office? A look at the patent

proceedings will demonstrate this fact even more clearly. Section 2325 reads in part as follows:

> "2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent under oath, showing such compliance * * *."

The land department has made a number of rules governing applications for patent, some of which we desire to call to the attention of the court:

> "31. Accompanying the field notes must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and his grantors, if he claims by purchase) with the mining rules, regulations and customs of the mining district, state or territory in which the claim lies, and with the mining laws of congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.
>
> "32. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as

follows, viz.: Where he claims to be the locator, or a locator in company with others who have since conveyed their interest in the location to him, a full, true and correct copy of such location notice should be furnished, as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records. Where the applicant claims only as a purchaser, a copy of the location record must be filed under seal or upon oath as aforesaid, with the abstract of title, under seal or oath as aforesaid, brought down to date of filing the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record other than those set forth in the accompanying abstract.

"The abstracts herein required may be certified to by the proper recorder, or by an abstractor or abstract company, duly authorized by state or territorial statute, if abstracts so certified by abstracters or abstract companies are by statute receivable as evidence in the courts of such state or territory, in the same manner and to like extent that abstracts certified by the recorder are now admitted; provided that proof be furnished that the abstracts so certified by abstracters or abstract companies are receivable as evidence in the courts as aforesaid."

None of these statutes or rules were copied in any of the original briefs filed in this cause, and we think, on reading them, the court will be convinced it has made a mistake, because their meaning is clear. The original record is a solemn one, made in a public office, and the patent application requires it to be verified. The record is not to be made until the vein has been discovered, a discovery shaft sunk and the boundaries marked upon the ground. The location certificates in the case at bar complied with these requirements. They will be found on pages 92-95 of the printed transcript. *But, says the court, they were not sworn to.* The statute does not require it in the first place, and, in the second place, the patent application stating the same thing was sworn to.

But, again, we are told that the order in which the various location steps are taken is immaterial, and, therefore, a patent does not relate back to the location. We do not admit the conclusion follows from the premise, but we deny the truth of the premise. It has been held, in a number of cases relating to controversies *before patent*, that the first party to perfect a valid location should prevail, and the order of taking the steps was not conclusive. But never until the case at bar was it held that a patent could be assailed under the guise of this doctrine. Ever since Mr. Justice Field laid down the rule in the first great mining trial had in the West, until the decision in this case was announced, this was regarded as fundamental. Mr. Justice Field said:

> "Each patent is evidence of a perfected right to the claim conveyed, the initiatory step for the acquisition of which was the

original location. *If the date of such location be stated in the instrument, or appear from the record of its entry in the local land office, the patent will take effect by relation as of that date*, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872."

Eureka Con. Co. vs. Richmond M. Co., 4 Sawyer, 302.

Even as late as 182 U. S., this court said:

"The patents were proof of the discovery, and related back to the date of the locations of the claims. The patent could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

Calhoun M. Co. vs. Ajax M. Co., 182 U. S., 499.

The mining world has rested secure in that conclusion down to the present moment, and now it is told that this is not true so far as tunnels are concerned. A tunnel claimant can attack a patent collaterally. To-morrow we may be told the same thing about a townsite or mill site claim, an agricultural entry or a forest reserve. And finally, the rule may be relaxed even as between mining claims, and a patent be of no more value than a location certificate, a title in fee of no more stability than a title by possession.

If the statutes and rules we have quoted mean anything, they mean that a discovery must be made, a location certificate prepared and filed and when a patent is asked for it must be based upon *a sworn statement of these facts.* Unless these facts are proved by sworn testimony no patent can issue. Why then should not the patent relate back to these facts? They are essential, the issue of the patent is a determination that they exist, and a determination that is binding on the world. Mr. Justice Brewer has himself clearly defined what an advertisement for and the procuring of a patent means. He says:

> "The proceedings before the land department are judicial, or quasi-judicial at least. The publication is process. It brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. True, no adverse claimant or supposed claimant may be named in the notice; no process may be served personally upon him; but that does not avoid the notice or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated. Unknown heirs are thus often brought in by a published notice. Tax proceedings, condemnations of rights of way, admiralty cases and many others present familiar illustrations. The sufficiency of the notice in these cases is unquestioned, even though the adverse claimant be not named,

> and no personal service be had. And if the parties be brought in, obviously it is that their claims be presented and determined. The succeeding section provides how such claims, if presented, shall be determined. Even without such section the purpose would be apparent. It would be grievous wrong to leave disputed claims unsettled, and when the owner of lands making such general offer prescribes time, place, tribunal and manner of settling adverse claims, such provisions are a part and condition of the offer, and should be vigorously insisted upon by the courts."

In the opinion, the court inquires: "Are all other parties concluded by the locators' unverified assertion of the date, etc.?" The court states the tunnel location was "verified by the oath of one of the locators," and while its opinion is no where expressly based on such verification in one case and lack of it in the other, the distinction between the two must have been present in its mind as a factor in deciding the case, or it would not have referred to it on every occasion when such verification or lack of it *could have made any difference.* We will admit that under some circumstances a sworn statement is better evidence than unsworn evidence, but we deny that in this case it is true. The location certificate of the lode claim does not, under the law, require a verification; that of the tunnel does. That is the reason why a verification in one case appears and in the other it does not. There is no reason why Winchell and McNeal should have sworn to their location certificate; no one ever does,

and as the law requires no verification, would such verification have added anything to the value of the certificate as evidence? Therefore, we maintain no presumption should be indulged in against the truth of the facts stated in Winchell and McNeal's location certificate because it was not verified.

But this is not all. The patent was not issued to these men as the court seems to imply, with no other evidence of the date of discovery than that contained in the unverified location certificate. The application for patent which was filed, contained a sworn statement of the date of discovery. This application was filed, to be sure, subsequent to the filing of the location certificate of the tunnel, but time is certainly not of the essence of the value of oaths. Consequently we have the verified location certificate of the tunnel filed in a "State office" February 25, 1892, opposed to the location certificate of the lode filed in the same state office February 1, 1892, unverified because not required by law to be verified, and the application for patent of the lode claim filed in the United States Land Office August 5, 1893, and sworn to in the manner provided by law.

We maintain the weight of evidence is in favor of the lode locators. Their statements, because part of the proceding *in rem*, passed on by the Land Department, are binding on all the world. The tunnel certificate became a part of no adjudication, and was open to no attack.

It is held that the land office merely decided that the discovery preceded the entry, and did not adjudicate the date. We submit this is not the case. The applicants were required to file a sworn statement of the date of discovery, not merely of the fact that a

discovery of mineral had been made. This sworn statement was open to attack, and the date often is attacked in adverse proceedings. It was not, it is true, attacked in this case, but nevertheless we hold that the date is required as an essential part of the application and is passed on, and being passed on in a proceeding *in rem*, is conclusive and binding on all the world. Like in any other adjudication, an allegation that is not denied is admitted. It may well be said in the light of this case that in any adverse proceeding the date of the discovery is not decided; merely that the discovery of one claimant was made prior to that of the other.

The court says: "The first appearance of the claim on the records of any office of the United States is the entry in the local land office of August 5, 1893," but it apparently forgets that this appearance was a sworn one and that as applications for patent go, it was made sooner after the discovery than a great majority of applications, as one of the requirements is that $500 worth of work had been done on the claim.

And as the court makes some sort of distinction or discrimination between appearances in state offices and in United States offices it is well to call attention to the fact that the lode has appeared in the United States office in a verified statement while the tunnel has never appeared in the Land Office, and does not appear in any United States office until the appearance of this suit four years later, and then merely as a defendant in an action.

The court says that the patent relates back only to the entry, but why name that date? The entry only determines the existence of preexisting facts and of facts which are matters of record and sworn to in the

application. We submit that some reason should be given for overriding the undisputed judgment of the mining world based upon a long line of unbroken decisions by this court.

The decisions relied upon by the court do not sustain its conclusions.

None of the decisions relate to patented claims, but all are based on contests relating either to the granting of patents or between possessory titles. It is, of course, fundamental that so long as the title has not passed from the government, the various steps necessary to make a complete location rest in parol, and the difference between a possessory title and a patented title is that the owner of the possessory title, if his right of possession is challenged, must prove all of these steps. The text writers and cases cited in the opinion by the court are based upon this condition of affairs. None of them are controversies that have arisen after the issuance of a patent. It was always supposed that a patent conveyed a good title, which, when placed upon record, would say to the world that the government, after investigation, had issued its patent so as to complete the possessory title which was upon record at that time; that is, the location certificate having been recorded, fixing the date of location and making a record of it, the patent placed upon the record would say that the government had, after a careful examination, confirmed the title claimed in the location certificate. It was simply a method of perpetuating testimony, as it were. The owner of the possessory title had at all times to prove the various steps of location, and, so far as the inception of his title was concerned, it rested in parol. He could re-

move these disadvantages by securing patent, but is there any advantage in securing a patent, if he is still compelled to keep his defenses on hand and be ready at any time to prove the various steps required to make a valid location? It is just as essential to the owner of a valid location that a discovery notice should have been posted at his shaft; that his claim should have been staked off; that he did the annual assessment work each and every year, yet if the doctrine of the court in this case is to prevail, the owner of the patented title will be required to prove any of these facts when some one claiming a prior title assails his rights. For instance, it is very justly stated that the order in which these various acts of location is taken is immaterial, provided no adverse rights have intervened. That is, if a man has neglected to stake his claim for more than ninety days after the discovery of mineral, and yet stakes it before third parties have acquired any rights, he loses nothing by his neglect. Suppose that a tunnel claimant should claim that in the interval he had filed a location certificate for his tunnel, and his rights had attached. Under the doctrine announced by this court in the case at bar, he would be entitled to prove this fact, even though the mining claim had passed to patent. The doctrine is not limited merely to the question of the date of discovery. It necessarily opens all questions on all the acts of location.

Suppose for argument there was no discovery made at the time; nevertheless this court in its opinion in this case holds that the patent is conclusive patent, therefore, instead of merely relating back to proof that a discovery was made prior to entry. The

the time of the entry as is announced in the court's opinion should relate back to the first valid act performed in locating the claims. The principle involved in limiting the relation back to the entry only is a dangerous one and introduces a new kind of uncertainty into mining laws and rights, and if that doctrine is established, as it certainly will be on the authority of this case, it means an overruling of the old doctrine of relation, and a new rule promulgated that in proceedings *in rem*, such facts only can be considered as adjudicated as were actually adjudicated, and these facts only established as were necessary to such adjudication. Even in an adverse proceeding, the date of the discovery may be established by direct proof, yet as the only question necessary to decide is whether one claimant's discovery was prior to the other's or not, then that is to be considered as all that was adjudicated and the relation back will only be to the date of entry.

This we maintain is the logical meaning of the doctrine enunciated in this case.

Now if the doctrine of relation applies to the tunnel, does it not apply only to the veins discovered in the tunnel, and not to the bore itself? Is not the principle of relation here based on the discovery of the vein in the tunnel and its relation back to the location of the tunnel? Can this relation be construed so as to permit the bore of the tunnel in its full 3,000 feet to relate back? Locations made within 3,000 feet of the mouth of the tunnel and within fifteen hundred feet on either side of the bore are made at the locator's peril as these veins are liable to be subsequently discovered in the tunnel. But can the tunnel claim a

right of way through a patented claim located subsequent to the tunnel? Is not the case similar to one building a ditch? If appropriated ground lies in his way, he can acquire a right of way, but he must pay for it. He has, no more than the ditch builder, the right to cross another's land. He may prospect all he wishes and may discover veins not disclosed at the surface that apex in the patented lode and may be entitled to these veins because as to them his discovery relates back to the original location, but it is only by torturing and confusing all rights and extending the law in one case to one entirely different that his right to the right of way can be claimed to relate back.

The doctrine of relation carries a title back to the first step in its inception always excepting where an adverse right has intervened.

Morrison's Mining Rights, 11th Ed., page 97.

McGinnis vs. Egbert, 8 Colo., 41.

Strepey vs. Clark, 7 Colo., 614.

Does this adverse right mean—

A right capable of settlement in adverse proceedings, or

Any right opposed to the right of claimant?

The words "adverse right" mean, we maintain, such rights as are capable of adjudication and such rights only. Otherwise the above doctrine means nothing. Using the word "adverse" in its broadest sense, there are a thousand and one ways in which an adverse right might intervene. A mortgagor or a lienor, the county by virtue of a tax assessment, *the owner of a right of way of necessity*, might each be

said to acquire an adverse right, but would any one say that their rights would prevent a relation back of the title?

If the tunnel, therefore, has no adverse right, it has no right that intervenes and the patent of the lode claim relates back to the filing of the location certificate, which is the first valid act even assuming the discovery was not made until after the tunnel location.

It can not, we maintain, be argued that the tunnel location has an adverse right and has not an adverse right. That it has an adverse right in so far as its right is sufficient to prevent the lode locator's rights from relating back, but it has no adverse right that can be adjudicated during the proceedings pending patent of the lode claim. To such a paradox is reduced any effort to establish a priority of the tunnel over the lode.

III.

A TUNNEL CLAIMANT SHOULD BE REQUIRED TO ADVERSE A LODE CLAIM WHEN THE ACTUAL LINE OF THE TUNNEL CROSSES THE LODE CLAIM.

This is the first case that has ever decided that a tunnel claim was not a mining claim, and not required to file an adverse where the line of the tunnel actually crossed the lode claim and carved out of the lode claim itself a portion of its ground. The uniform ruling of the land office has been that a tunnel claim should adverse. The latest expression of the opinion

of the land office was the case of Byron B. Burton, 29 L. D., 235. There the decision of Secretary Hitchcock was rendered in a carefully prepared opinion by Judge Van Deventer, at that time assistant attorney general for the department of the interior, and now United States circuit judge for the Eighth circuit. Judge Van Deventer is one of the best qualified officials to pass upon qustions of this kind ever connected with the land department. He held, in that case, that a tunnel claim was a mining claim, and where the line of a tunnel crossed a lode claim, it should be made the subject of an adverse suit. The case of Ellet vs. Campbell, 18 Colo., 510, afterwards before this court in 167 U. S., 116, was the case of an adverse filed by the owners of a tunnel against the application of a lode claim. In the nature of things, there is no reason why a tunnel is not an adverse claim, within the meaning of the statute. The court must, of course, understand that there is a distinction between a tunnel itself and the discovery of veins in the tunnel. There is also a distinction to be made between a tunnel itself, as to whether it actually crosses a lode claim, or, as in the case of the Rico-Aspen Company, passes entirely outside of the lode claim. If we concede that the course of the line of the tunnel does not actually conflict with the lode claim, there would be no question for an adverse suit. In that case the conditions are those mentioned in the opinion on this case. That is a condition of affairs that may or may not arise in the future, and, of course, a party would not be held to adverse upon mere contingencies, but even then some of the courts of the western states have held that an injunction would lie to restrain the owners of the lode claim

from getting a patent until it was ascertained whether or not the owners of the tunnel claim would, in the future, have rights which might conflict with it. This suggests a practical remedy for an emergency of this kind, but it is useless to discuss this condition of affairs, because it is not before this court at this time.

In the case at bar we have an actual conflict of territory. We have one mining claim applying for patent; we have another mining claim lying practically across the first claim, which is contending for an adverse position to such claim. We submit that, under any ruling or construction, it should be required to file its adverse suit. There is a distinct conflict over a distinct tract of ground. The mere fact that none of the surface is claimed should not cut any figure in the matter. It is the material underground that is of value in a mining claim, and not the surface of the ground. A tunnel claimant is not insisting upon a mere right of way. His tunnel is more than that. It cuts a distinct segment from the mining claim itself. We insist that a tunnel amounts to much more than a mere right of way. A valid tunnel gives to the owner a title to a tract of ground the size of his tunnel and the length of the bore. For instance, if the owner of a tunnel should drive it 3,000 feet in length and not discover a single lode, he would still be entitled to his tunnel as an article of property, and no one could take up land which would give them the title to this tunnel unless there was a distinct abandonment by the owner. Suppose, for instance, that instead of the tunnel having reached the Ocean Wave claim, in the case at bar, it had actually been driven through the claim at the time

the Ocean Wave applied for patent. Would it be reasonable for this court to say that the owners of the tunnel should not, under these circumstances, protect their rights by an adverse suit, and, in case they failed to adverse, under such circumstances would they then be entitled to the ownership and use of their tunnel through the Ocean Wave? We do not believe that this would be conceded for a moment, and yet, is there any difference between that state of facts and those in the case at bar, so far as the maintenance of rights is concerned? We ask the pardon of the court for the discussion of this principle, because a special brief was filed by Judge Helm, as *amicus curiæ*, discussing this identical point, and we only ask the court to give to that brief careful consideration before passing upon this proposition. It seems to us so clear that, where there is an actual conflict between a lode claim and a tunnel claim, that there should be an adverse suit filed, that we can not forbear once more to urge this point upon the attention of the court.

The opinion rendered in this case would seem to be founded on a general principle that tunnel rights can never be the subject of an adverse proceeding, because those rights are too uncertain.

The error permeating the whole decision is based on a sentence almost at the end of the opinion: "Until the discovery of a lode or vein within the tunnel, its owner has only a possibility." A possibility of what? Of discovering a vein. But he always has more than a possibility of his bore. That is always certain; he is compelled to note certainly what he claims in his location notice. Hence a reason why he

should not be required to adverse a lode location. When he can not tell whether he has any rights or not can not be be applied to this case where he knows what his rights are.

Confusion can only result from considering tunnel rights as one group or class of rights. In reality there are two entirely distinct kinds of rights belonging to and accruing from a tunnel location.

1. The right to the bore itself.
2. The right to veins discovered therein.

The first one can never be said to be uncertain. The second one may be uncertain but when those rights cease to be inchoate and become certain, that is, when a vein is discovered in the tunnel, the tunnel locater is required to adverse if the vein discovered in the tunnel is subsequently discovered from the surface and the lode claimant attempts to patent. Here says Lindsey, section 725, in the light of the Enterprise-Rico Aspen case, the rule is: "Where a lode claimant applies for a patent to a location embracing a lode which has been previously discovered in the tunnel, the tunnel claimant will be compelled to adverse to perfect his right."

In point of fact, so far from the law being as is noted by the court in its opinion in its case, that a tunnel locator need not adverse an application for patent of a lode claim lying across the line of the tunnel, *the exact opposite is the law* laid down in the books and in all the decisions that have been rendered on this point. Never before has it been said that the tunnel claimant need not or must not adverse in such a case. Even where a condition has arisen as in the Rico-Aspen-Enterprise case where it was held that

it was not necessary for the tunnel applicant to adverse, the opinion was based on reasoning which could only mean that where a tunnel claimant had rights that could be ground for adversing he must adverse.

Back vs. Sierra Nev. Con. Mng. Co., 2 Idaho, 386; 17 Pac., 83.

Bortie Co. vs. Bechtel Co., 1 L. D., 584.

Barrington & Adams, page 496.

IV.

IN THE RECORD IN THIS CASE THE TUNNEL CLAIM APPEARS TO BE IRREGULAR AND VOID.

Another fact overlooked or at least not referred to is that the Uinta Tunnel is not a statutory tunnel, under which any right can relate back to its location as discoveries made in the tunnel can relate back only when the statutory requirements in locating that tunnel have been complied with. The record clearly shows that the Uinta Tunnel was not located under the statute, nor can a tunnel located under the Colorado act comply with these requirements, but not with those of the federal statutes, be entitled to the benefit of relation which the federal courts give to tunnel locators under the federal statutes.

Suppose it possible to make a location under the federal statutes that did not comply with the requirements of the Colorado statute. Could such a

tunnel be said to have the right to pass under or through patented claims?

Mr. Lindley says:

> "A discovery may be made in any ordinary tunnel not located under the tunnel laws. To complete his initiatory rights, however, the locator must in such case make a surface location the same as in cases of ordinary surface discovery. It is only when the tunnel site has been properly located and claimed under the tunnel laws that the vein discovered in the tunnel need not be located at the surface."
>
> 1 Lindley, Section 482.

Now the law regarding tunnel locations is not found in section 2323. The subject is regulated entirely by rules prescribed by the commissioner of the general land office under the direction of the Secretary of the Interior, the authority for such regulation being found in revised statutes, sec. 2478, and these rules when not repugnant to the acts of congress have the force and effect of laws.

> Orchard vs. Alexander, 157 U. S., 383.
>
> Cosmos Ex. Co. vs. Gray Eagle Oil Co., 112 Fed., 4.

The rules of the land office require a tunnel locator, as soon as his projected tunnel enters cover, to give notice by erecting a substantial board or monument at the base thereof upon which must be posted a good and sfficient notice containing:

1. The names of the parties or company claiming the tunnel right.

2. The actual or proposed course or direction of the tunnel.

3. *The height and width thereof.*

4. The course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus as in case of lode claims.

This applies to the present case. If the vein discovered in a non-statutory tunnel does not relate back to the location of the tunnel, certainly the tunnel itself can claim no such relation back.

The Uinta tunnel, as shown by defendant's Exhibit F, was a surface location, 3,000 feet long by 1,500 feet wide, and in marking the boundaries by stakes on the surface these exterior lines were marked, *but no marking of the line of the bore was made.*

And *at the time* of posting the notice and marking out the lines a full and correct copy of such notice, defining the tunnel claim, must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, *setting forth the facts in the case*, stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon, *the extent of the work performed*, and that it is their bona fide intention to prosecute work on the tunnel so located and described with reasonable diligence.

In the record (folio 225) Exhibit F is a certified copy of the location certificate filed in the recorder's

Nor can the tunnel owners, with their defective location, be heard to say that the lode location was

not properly made. If the tunnel location was, as we have shown, void, how can the tunnel locators claim a priority over the lode claim, though the location of it was, as they allege, defective?

There is one other point in this connection worthy of notice. The court, while denying the necessity of an adverse on the part of the tunnel claimant, because the tunnel's right were uncertain and inchoate, nevertheless recognizes the tunnel right as certain and vested in this sentence:

"If the tunnel right was vested before a discovery in the plaintiff's lode claim the defendant ought to have the benefit of it;" and further on quotes section 2339 as to the effect of rights and easements that have "vested and accrued."

Setting aside the question just discussed as to whether the tunnel right vested at all by reason of the null location notice we desire to ask when a tunnel right vests? A tunnel right is not a right of way like a ditch right created by user; it is a most a right to a right of way. If the analogy of the court is good, the tunnel right does not vest until occupation and user. But the analogy is not good. If section 2339 intended to recognize such tunnel rights, it would have mentioned them. Further, too, the continuation of section 2339, which the court does not quote, is interesting and instructive:

> "But, whenever any person in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

The right of way granted to ditches, roads, etc., is expressly declared by the statute to be subject to prior rights, and while a right of way can be claimed across a mining claim, it must be paid for. Hence the reasoning does not apply. Even should the ditch be begun before the mining claim is located, such subsequent location in the path of the ditch, makes the right of way, so far as running through the mining claim is concerned, one that must be paid for.

The incompleteness of the analogy between the two cases is apparent.

First. The right of way for water in arid regions is granted on the ground that water is a necessity. Rights of way of necessity have always been classified different from other rights of way.

Second. The right of way must be paid for when it crosses a located claim, and this is so, even though the location is made subsequent to starting the ditch.

We submit, therefore, that the opinion rendered in this case is not only based upon an assumption of facts that the record does not sustain and is contrary to the law as heretofore construed and applied, but constitutes a menace to the mining industry of the United States in what it implies and what may be inferred from it, as well as in what it expressly decides. If a tunnel locator is not required to adverse to protect his tunnel bore, a wide field is opened for unscrupulous adventurers and the condition of the prospector rendered correspondingly more precarious. If the date of discovery is held not to have been adjudicated in the proceedings leading to the patent of the lode claims in this action, it is, we maintain, the logical outcome of this opinion, to hold that the *date* is never decided in any patent proceeding, whether

adversed or otherwise, but merely the *priority* of one location over another. If a patent, which has always heretofore been considered inviolable, may be attacked or modified in this action, an entering wedge has been found for other oblique attacks. If the tunnel claimant, with his void location in this case is permitted all the rights of a valid locator, then there is no reason why these rights should not be held to belong to the locator of any tunnel. And, finally, if the patent in this case relates back to the entry only, then, we submit, it will be necessary to modify the whole doctrine of relation and carry the relation back to the entry only in every case.

This opinion makes the tunnel bogey, which has always been feared by miners, and which it has been the purpose of statutes, district rules, land office rules and decisions of courts to restrain as much as possible, an actual menace, even more threatening than the miner has pictured it. In a word, this opinion attacks the whole mining industry of the United States.

We ask, therefore, for a rehearing on the questions decided in the opinion heretofore rendered in this case.

Respectfully submitted,

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TUNNEL-RIGHTS UNDER THE UNITED STATES MINING LAW.

By R. W. Raymond.

Section 2323 of the Revised Statutes is as follows:

> "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing upon the surface, made by other parties, after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel."

This is the only provision in the Revised Statutes concerning tunnel-rights. Perhaps it is fortunate that there are no more. Certainly this one is ambiguous and perplexing enough, and additional ones of the same character would have made confusion worse confounded.

In attempting to discuss this provision, and to set forth its interpretation by the courts, I am led at the outset to point out the historic cause of its fundamental defect—a cause which underlies also many other defects of the Act of 1872.

The customs of miners and the Act of 1866 recognized, as the foundation of mining title, the priority of discovery. The Act of 1872, intended to remedy certain evils developed in the administration of the Act of 1866, comprised various provisions for that purpose (provisions, that is to say, which assumed the principle of the former Act, and only modified its application) and also provisions of a totally different character, creating the new principle of apex-rights, and thereby nullifying the customary rights attached to discovery pure and simple. The Act containing this revolutionary innovation was never carefully harmonized throughout, in accordance with the new principle thus established, and presents many features really intended to be parts of the old *discovery*-law (so to speak) and not framed to be parts of the new *apex*-law. This tunnel-section is one of these anachronisms. As an amendment to the Act of 1866, it is, taken by itself, simple and clear enough, though perhaps not wise. As a part of the Act of 1872, it is inconsistent, incomplete, and mischievous.

This statement as to its original purpose will be self-evident upon an examination of its text.

1. It first gives to the owners of a mining tunnel the right of possession to all veins discovered in the tunnel (and not previously known to exist) *to the same extent as if discovered from the surface.* (The limitation to 3000 ft. from the face, and to the

line of the tunnel, I pass by for the present.) Now, under the Act of 1866, discovery from the surface gave a right of possession; and this right could be exercised independently of the ownership or location, by the discoverer, of any tract of land. But the Act of 1872 requires as a prerequisite of the possessory right to a vein the location of a tract containing the apex; and discovery not accompanied by such a location does not confer that right. It follows that, as a part of the later law, the provision above quoted, literally taken, confers nothing upon tunnel-owners except the right of a surface-discoverer, to make a location on the apex. If A discovers from the surface a lode, but locates his claim, unfortunately, so that it does not include the apex, and B subsequently makes, upon a later discovery of the same lode, a location properly covering the apex, A's prior discovery gives him, under the present law, no rights superior to those of B. All that this section, as thus far quoted, does for C, a tunnel-owner, is to put him in the position of A;—and there he must stay, until he can find the apex of his discovered vein, and locate upon it. Evidently this ludicrous result of the attempt to benefit C by legislation is due to the fact that the provision was framed to fit the Act of 1866, and is out of joint with the building which, while it was being thus mildly tinkered, was also being radically reconstructed.

2. Secondly, this section provides that, during the diligent prosecution of the tunnel, locations made by other parties, on its line, of veins not appearing on the surface, shall be invalid. It is clear that such locations of veins which *do* appear on the surface

are not thereby declared to be invalid. On the contrary, they are evidently meant to be valid, if based on prior discoveries. This is simply a recognition of the preceding provision, by which the discovery in the tunnel is put upon the same footing as the surface-discovery. In either case, the inception of title dates from the discovery. This second provision makes a further distinction with regard to "blind lodes," and these only. The discovery of such lodes in the tunnel dates back, as a foundation of title, to the commencement of the tunnel, and therefore invalidates locations subsequent to that date, though based on discoveries actually antedating the tunnel-discovery.

Again we may observe that this provision is consistent and practicable enough with the Act of 1866, and quite out of joint with the Act of 1872. Construed as a part of the former Act, it amounts to this: that a party diligently prosecuting a tunnel for the discovery of new lodes shall have the exclusive right to the fruits of underground discoveries of "blind lodes" within a certain area. For instance, if A is driving a tunnel, and B, sinking a shaft on the line of that tunnel and less than 3000 ft. from its mouth, comes upon a blind lode, before A gets there with his tunnel, B can not make a valid location of that lode; and when A reaches it, his second discovery of it, dating by relation back to the commencement of his tunnel, will be legally the first discovery, and thus a valid basis for title. At the same time, I repeat, according to the letter of the law, B can validly locate a lode *appearing on the surface* at any time before its actual discovery in the

tunnel. The reason for these provisions (considered as simple amendments to the Act of 1866) is plain. They were intended to encourage the driving of deep tunnels, without discouraging surface-prospecting; and to this end, the tunnel-owner received a monopoly of the fruits of his underground explorations within a certain pre-empted field, while at the same time he was not allowed to monopolize the lodes which could be found at the surface. With regard to the latter, he was placed on the same footing as the surface-prospector—priority of actual discovery being the basis of superior title.

But when we look at this provision as part of the Act of 1872, its impracticable character—or else its utter lack of value—becomes evident. For this Act attached to a valid lode-location two new appurtenances. The first is the ownership of the tract embraced in the location—which, as the courts have repeatedly held, is, by the very act of location, withdrawn at once from the public domain. The second is the ownership of all other veins, besides the vein located, which have their apexes within the location; and this ownership vests in the locator at once, before any discovery of the said other veins and without any location of them. Now let us suppose that while A is running a tunnel, B discovers a lode on the surface before the tunnel has reached it, and makes a location on it, as he has, under the terms of this section, a clear right to do. But that location proves afterwards to contain the apex of another lode—a blind lode—which A reaches in his tunnel, perhaps thus making its existence known for the first time. A cannot claim this lode, so far as B's location holds it, because

it has been decided to B already. True, the statute says that a location by B on this blind lode shall be invalid under the circumstances. But B has made no such location. The lode belongs to him by virtue of his perfectly valid location on another lode, to wit, a lode appearing at the surface and first discovered by B. A's special tunnel-right, as part of the present law, seems therefore to be either practically valueless, or to be contradictory to other features of the law. As we shall presently see, the judicial attempts to solve this contradiction so as to leave A something of value have varied according to the choice, between the conflicting principles, of the one which shall take precedence.

With regard to the condition of this subject prior to 1866, Mr. Curtis Lindley says:*

> "We think it may be fairly stated that, prior to any legislation upon the subject by Congress, in popular estimation the purpose of a tunnel-location was that of discovery of blind veins or deposits, whose existence it might be difficult, if not impossible, to establish by surface-exploration, and that such discovery by means of the tunnel should be treated as the equivalent of one made from the surface. As to questions of priority, it was a mere race of diligence. Rights upon

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*A *Treatise on the American Law Relating to Mines*, etc. By Curtis Lindley, of the San Francisco Bar, 1897, Vol. 1, p. 467.

> the discovered lode dated from the discovery in the tunnel, and not from the date of the tunnel-location. Surface-prospecting within the vicinity of the projected tunnel line was not inhibited. The chances of a successful discovery in many formations were largely in favor of the tunnel method, and this was the inducement for projecting it; but the tunnel locator's privilege was not understood to be an exclusive one within any defined surface-area."

This, I think, is a true picture, except as to the statement that "the chances of a successful discovery in many formations were largely in favor of the tunnel method." That I seriously doubt. The driving of tunnels for discovery has not been generally profitable, so far as I know, apart from the artificial advantage conferred by the law in some cases, of dating the discovery of a vein back to the location of the tunnel. That is to say, if B, C, D, etc., are actively mining from the surface of a mountain upon valuable lodes, and exploring in depth, and if the formation be such as to favor the occurrence of blind lodes in depth, it may be profitable for A to prosecute with "diligence" a tunnel projected to underrun their claims, so as to acquire by virtue of his tunnel location a prior right to the blind lodes which either he or they may discover. But there was no such privilege as this attached to tunnels before 1872. And, according to my personal recollection, there were very few deep tunnels, if any, run before 1866. It was after that date that the "tunnel-fever" arose in Colorado,

and led to the enactment in 1872 of the section we are now considering.

I may say, in passing, that many of the positive faults of the two leading United States mining laws have been due to local interests, seeking protection or advantage without sufficiently regarding the general effect of the legislation sought. Thus the local conditions of the Comstock mines dictated the main features of the law of 1866. In 1872, the mining interests of Colorado were at the front, and the protection of Colorado tunnel-companies was called for. There had been a sudden development of such schemes in that state, due partly to the wide discussion of the Sutro tunnel in Nevada, partly to the recent introduction of machine drills, cheapening and accelerating the driving of tunnels, and partly to the favorable conditions presented by the precipitous Colorado canons, between mountains known to contain numerous fissure veins of rich ore.

I had occasion at an early date to utter a warning against the folly of multiplying tunnels for this purpose. In my report as United States Commissioner of Mining for the year 1870, I observed *that the so-called tunnel fever had been a noteworthy peculiarity of the operations of that year, particularly in Clear Creek County, Colo. Innumerable tunnels

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*For the full statement here condensed, see "Statistics of Mines and Mining in the States and Territories West of the Rocky Mountains for the Year 1870." This report was transmitted to Congress March 16, 1871. My discussion of this subject begins on page 322.

had been located, and much money had been already wasted in attempts to develop thus the "wealth" of this, that or the other mountain. I pointed out that a tunnel driven to find new loads must be a cross-tunnel, run wholly in country-rock, and was likely to be the most expensive of all forms of prospecting. Its cost must be not only large but indeterminable beforehand; and experience had shown that an equal expenditure made in surface-explorations would be likely to find many more lodes of value.

Again, cross-cutting may find a lode, but does not determine its value. This requires additional work upon the lode itself, and ultimately, shafts.

The advantage of cheaper transportation through a tunnel is not great enough to warrant its cost. But the advantage of drainage (with or without incidental saving in transportation and ventilation) is often so great as to warrant large outlay in tunneling. This depends, however, on the amount of water to be handled, which, like nearly all other facts determining the advisability of a long adit, can only be known after the extensive development of the mine or mines to be served.

Consequently, deep cross-tunnels should be auxiliary and not primary works; should be run chiefly for drainage; and should connect with the workings of established and productive mines. This is the case in all other countries; and all experience in our own confirms the principle. For such a purpose, one deep drainage-adit is sufficient for a large area; and the multiplication of parallel tunnels at the same level is folly.

I quote from the conclusion of my exposition of this subject in 1870 the following portions:

> "It is almost as absurd to run a cross-tunnel after blind lodes as it would be to sink a shaft at hap-hazard in dead rock. The rights attached to a tunnel-claim, unaccompanied by surface-ownership of known lodes to be pierced, are extremely visionary. The only tunnel-right which would be really valuable, our laws do not give. I mean the right to exact a royalty from mines benefited by the tunnel. This has been granted by contracts and confirmed by legislation in the case of the Sutro tunnel in Nevada, an enterprise which, I need hardly say, as it is connected with the largest, deepest, and most productive mines in the country, does not belong in the category I am now discussing. The tunnel-royalty was, in Europe, for centuries the privilege of every one who should drive a tunnel not less than 30 feet deeper than any preceding one, so as to benefit an overlying mine. I do not say it would be wise to make this provision generally applicable to our mines; but this I do say, that in the absence of some such tangible source of revenue, deep cross-tunnels, underrunning only undeveloped or unknown lodes, or lodes belonging to other owners, are gratuitous folly."

From this general condemnation, certain individual enterprises were excepted by me, in the report

above cited; yet even with regard to these, doubts and cautions were expressed, which later experience fully justified. While some of them have not been total failures, I do not think that any one ever did or ever will repay its cost.

The situation thus explained led to the desire, on the part of the tunnel-projectors, for some more definite and valuable encouragement to such schemes. The power to exact a royalty for drainage was not asked. At that time, the cost of drainage was oppressive in a few mines only; and a compulsory subjection to royalty on that account would have been unpopular and impracticable. Nor could it be expected that the miners generally would submit to the prohibition of surface-prospecting within a large area overlying a projected tunnel. The *bonus* finally secured was embodied in Section 2323, above quoted, and consisted of the two provisions I have already discussed, the first of which was simply a re-enactment of exsting custom, while the second gave, as to blind lodes, a sort of preemption or inchoate right, not previously existing.

Let us now inquire what is the actual effect of this section, as construed by the courts, in connection with the Act of 1872, of which, as I have explained, it was not originally framed to be a part.

1. To the generally loose, clumsy, and incorrect use of English in the Act of 1872, Section 2323 forms no exception. The hand that could write "apex," meaning not a point, nor a line, but the total thickness or cross-area of a vein nearest the surface, and could describe the "extending" of horizontal surface-lines "downward vertically," was quite competent to

label a cross-adit "tunnel." Properly speaking, a tunnel is open at both ends. The meaning of this section, however, has never been questioned; and the word "tunnel" has in fact now acquired among miners this special significance. The section undoubtedly refers exclusively to adits starting from daylight, and running into the mass of the mountain. And while it does not specify cross-adits, it can not be applied to adit-drifts, or tunnels run in on a vein, and following the vein. For such a tunnel could not discover other veins, being kept within one already discovered.

2. The term "face" is another misnomer. The face of a tunnel or drift is the same as its breast—that is, the area of unbroken rock at its inner end. Taken in this universal sense, the section would give to the tunnel-owner an intolerable privilege, namely, a preemption right always advancing, and reaching 3000 ft. ahead of the point at which he might have arrived at any given time. But this construction, though required by usage, is so repugnant to law and justice that it has never been urged. There is general acquiescence in the practice of the Land Office (explicitly confirmed, I believe, by the courts), which assumes the face of a tunnel to be the first full exposure of its height and width after entering under cover.

3. The "line" of the tunnel is not so misleading a term, though sufficiently obscure. It has been authoritatively construed to mean the space between the sides of the tunnel, throughout the length of 3000 ft. from its face in the direction claimed.

4. The manner of making a tunnel-location on the ground, and otherwise perfecting it, is not pre-

scribed by the statute directly. But the General Land Office requires that, as soon as the tunnel enters cover, the locator shall post at the "face" a notice containing the names of the parties, the actual or proposed direction of the tunnel, its height and width, and the course and distance from the face to some prominent landmark. This notice, together with an affidavit of certain facts and of the intention to prosecute the work with diligence, must be filed for record, like the notice of a lode-location. Moreover, the "boundary lines" of the tunnel are to be established by stakes and monuments, at proper intervals, from the face to the terminus of the 3000 ft. of length. This last requirement seems almost absurd. The law mentions only the "line" of the tunnel; and this line, one would think, could be sufficiently shown by monuments along the axis. It is hard to see any use in staking out a parallelogram 3000 ft. long and, say, 8 ft. wide.

There is, indeed, some reason to believe that the original idea of the framers of Section 2323 was that a tunnel-locator might lay out a tract 1500 feet wide (*i. e.*, 750 ft. on each side of the tunnel) by 3000 ft. long, as the area within which other locations should be invalid, while he continued to work. If I remember correctly, this was the view entertained in 1872 by some enterprising Colorado adventurers, who undertook, by marking off tunnel locations side by side, along the foot of a mountain, to monopolize a large amount of mineral ground. The public indignation aroused by this attempt resulted in a hasty retreat from the position, and in a letter from the Commissioner of the General Land Office, addressed to Sen-

ator Chaffee of Colorado, Sept. 20, 1872, which declared:

> "The line of the tunnel is held to be the width thereof, and no more, and that upon this line only is prospecting for blind lodes prohibited while the tunnel is in progress, and that the right is granted to the tunnel-owners to 1500 ft. of each blind lode, not previously known to exist, which may be discovered in the tunnel; but that other parties are in no way debarred from prospecting for blind lodes or running tunnels so long as they keep without the line of the tunnel as herein defined, the said line being required by our regulations to be marked on the surface by stakes or monuments placed along the same from the face or point of commencement to the terminus of the tunnel-line aforesaid."*

5. With regard to location upon a lode discovered in a tunnel, the Land Office has held that no patent can issue without a surface-location, and that this location must include the apex. This view, which has been followed in some judicial decisions, and which Mr. Curtis Lindley, in the treatise already cited, maintains with much force and clearness, seems to me to satisfy fully the text of the provision that the tunnel-owner shall have the right of possession "to

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*Copp's *United States Mineral Lands*, 2d edition. "Land Office Rulings," p. 90.

the same extent as if discovered from the surface." For under the present law, a surface-discovery gives no other right than that of location. The discoverer must locate a claim; and if he locates so as not to cover the apex, his priority of discovery will not cure that defect in his title.

But the United States Supreme Court, in a recent case (Campbell vs. Ellett, 167 U. S.), has adopted the rule that a failure to mark on the surface the boundaries of a tract claimed will not destroy the right of the tunnel-owner to veins discovered in the tunnel, provided he posted proper notices at the mouth of the tunnel, and filed them in the office required by the local statute. In this decision the preponderance has been given to the principle of discovery over the principle of the apex-law; and the result is going to be a very perplexing confusion in many cases. But I will not stop here to point them all out. The mention of a single example will suffice. The law gives to a locator on the surface, rights in all lodes apexing within his location, whether blind lodes or not. Such a location, made before any tunnel was commenced, would undoubtedly be valid against the tunnel. If a blind lode first struck in the tunnel should prove to have its apex within such a prior and valid surface-location, and therefore to have been withdrawn from the public domain before any tunnel-rights existed in the premises, the tunnel-owner could not claim it. Yet if he is not bound to make a surface location including the apex of the vein he claims, how can any one know whether it is lawfully claimed by him or not?

6. The tunnel-owner's right of possession dates by relation back to the time of location of the tunnel-

site. This rule, I cannot but believe, will have to be modified in some cases hereafter. Taken together with the following, settled in the same case (Enterprise vs. Rico-Aspen, 167 U. S., 108), it produces a strange result.

7. The questions, how many feet along a vein discovered by tunnel may be lawfully claimed, and whether this length must be equally on both sides of the tunnel, have been differently answered in the State courts. But it is useless to consider the ingenious solutions thus offered, now that the United States Supreme Court, in the case just cited, has held that the location of a claim to a vein discovered in a tunnel may be made on its discovery by taking the full length of 1500 ft. allowed by United States Revised Statutes, Section 2320, on either side of the tunnel, or any such proportion thereof on either side as the locator may desire; and is not limited to 750 ft. on each side of the tunnel on account of a failure to indicate, when the tunnel was located, what particular 1500 feet he would claim.

This presents the remarkable situation that the tunnel-owner, by simply locating his tunnel, fixes the date of his title to property yet undiscovered, but that he need not decide where he will place his claim upon it until actual discovery. In other words, a width, not of 1500 ft., the maximum length of lode-claim allowed by law, but of 3000 ft., is set apart for his optional occupancy of any 1500 ft. of continuous vein-length within it. Nobody can go safely into that dangerous zone until the tunnel-locator shall have made his discovery and exercised his option. Moreover, it seems to follow that, even after a tunnel has passed

through the course of an intersecting vein, without "discovery" of it, the tunnel-owner, guided by developments made by surface-explorers outside, may go back, hunt again, find what he wants to find, and date his "discovery" back, so as to take the bonanza developed by others. If this is not locking up the public domain against exploration, it is difficult to see what would deserve that title.

Here again the Supreme Court has given predominance to the wrong principle. And its ground (like the ground of some similar decisions below) seems to be that the absurd and exceptional privileges conferred by this construction upon tunnel-owners are justified by the wisdom of encouraging deep tunnels. As I have already explained, such tunnels, for exploration only, are generally foolish, and ought not to be encouraged. There is some reason to fear that the latest construction of the "tunnel-section" of our law will help to encourage schemes of blackmail, and delusive schemes of speculation. We have seen already in certain pompous prospectuses some of its fruits. It constitutes, in my judgment, a new danger to legitimate industry without opening any real chance for legitimate investment. Still, it is now confirmed as the law by the highest authority; and mine-owners must meet the fruits it may create for them.

As a legitimate remedy for the evils thus inflicted upon mining by Congress and the courts together, I can think of nothing better than the simple abolition of Section 2323 of the Revised Statutes.

The owners of lode-locations made before the location of any tunnel projected to underrun them

may, I think, even under the extreme views recently announced by the Supreme Court, rest secure in their possessory or patented titles. To those whose locations are of later date than the location of a tunnel which does, or will, underrun them within 3000 ft. from its mouth, I would say:

1. Watch for a chance to buy out the tunnel-claim, if you can. This is likely to be the cheapest way out. Moreover, if your mine is valuable, and if you are likely to be seriously troubled with water, the tunnel may be worth to you, in the end, all that it costs you to buy it and extend it, quite apart from its bearing upon your title.

2. If there be no tunnel threatening to underrun your property, locate and start one at once. The "diligence" of prosecution required by the law is not an onerous burden, compared with the cost of fighting pirates. Moreover, such a tunnel might be started by an agent of all the surface-owners, under an agreement for the equitable adjustment of costs and benefits.

3. If you have to face a fight with a tunnel-owner, asserting ownership of the ground you are working, and basing his claim on an alleged discovery in his tunnel, dating back to the original location of the tunnel, you have still a good deal of fair fighting-ground.

a. You can thoroughly overhaul the history of the tunnel, and possibly show that it has not been "diligently" prosecuted. On this point the requirement of the United States law is very lenient. But, in fact, it is not really a requirement, but only a limit

set to the leniency of local legislation. The laws of the States may be much more severe in their definition of "diligence."

b. If your location, though made after the location of the tunnel, was properly made in a lode appearing at the surface, and not yet discovered in the tunnel, I think it is valid, and secures to you, not only the ownership of the located lode, but also that of all other lodes, blind or otherwise, apexing within your ground. This opinion seems to contradict the sweeping dictum of the United States Supreme Court in the Rico-Aspen case, cited above; but I do not think the precise situation here stated was clearly before the court; and, at all events, I think there is still a good fighting chance for its recognition. I need not argue at length my grounds for this opinion. The chief one is that neither the statutes nor the rules of the General Land Office prohibit the location in ground traversed, or to be traversed, by a tunnel, of lodes appearing at the surface, and that, with regard to *such* lodes, at least, the tunnel-discoverer is explicitly endowed with the same possessory rights—no more and no less—as the surface-discoverer. But these rights include the possession, upon location duly made, of other lodes than the one explicitly located upon; and (within the boundaries fixed by the end lines of the location) all title to all the said lodes is, by the act of location, vested in the locator, and tract and lodes are thereby withdrawn from the public domain. In view of these considerations, I think the case I have stated presents good fighting-ground; and I wish that this issue, free from all others, could come before the United States Supreme Court; for I

believe that thoroughly impartial (though, in the difficult interpretation of our amazing mining law, not always thoroughly intelligent and foreseeing) tribunal would find a way to reconcile the letter of the statute with its equitable administration. And, with regard to the particular point just stated, I believe this all the more confidently because, as to this point, the strict literal construction of the statute seems to me the most just and reasonable that can be given to a confessedly obscure phrascology.